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No. 06-887

IN THE

Supreme Court of the United States

CITY OF REVERE, ET AL.,

Petitioners,

v.

T&D VIDEO, INC., D/B/A MOONLITE READER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME JUDICIAL COURT FOR
THE COMMONWEALTH OF MASSACHUSETTS

REPLY BRIEF FOR PETITIONERS

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Dated: May 16, 2007

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

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REPLY BRIEF FOR PETITIONERS

I. REVERE PROPERLY RAISED AN IMPORTANT FEDERAL QUESTION IN THE PROCEEDINGS BELOW

In their opposition to the petition for certiorari, Respondent T&D Video, Inc. d/b/a Moonlite Reader ("T&D") contends that Petitioners City of Revere, et al. ("Revere") failed to raise the federal question as to the standard for a complete denial of all fees in a petition under 42 U.S.C. Section 1988 in the proceedings below. This claim is demonstrably incorrect, as Revere expressly and consistently raised the issue in the courts below.

In the Trial Court, as the Trial Judge noted, Revere argued that T&D's request for fees should be denied in its entirety because it reflected a "total lack of billing judgment and is grossly excessive." See Appendix to Petition for Writ of Certiorari ("App.") p. 17a. The Trial Court declined to deny all fees, citing the "shock the conscience" standard, as well as the "excessive or egregious" and "special circumstance" standards. See App. 17a-18a.

On appeal to the Appeals Court, Revere raised the same argument that had been pressed in the Court below. See App. 42a. In its brief to the Appeals Court, Revere captioned the entire section as follows: "The Trial Judge Failed to Apply Appropriate Legal Standards In Awarding Legal Fees and Costs to T&D." The subsection argument continued with the title, "T&D's Application should have been denied in its entirety since it reflected a total lack of billing judgment and was grossly excessive." See Brief for Revere to Appeals Court p. 33, attached to T&D's Opposition as Appendix I, p. 38a. Extended discussion of the differences in the approach in the circuits was unnecessary since Revere relied upon the

binding authority in the First Circuit, *Lewis v. Kendrick*, 944 F.2d 949 (1st Cir. 1991).

After the Appeals Court decision, Revere continued the same argument in its application for further appellate review to the Supreme Judicial Court. In portions of the application that T&D did not reproduce in its appendix, Revere argued that review by the Supreme Judicial Court was important because of the Appeals Court's failure to assess properly T&D's fee application.[1] Indeed, Revere set forth the issue for review as "Whether T&D's request for an award of attorneys fees was so excessive as to require a denial of all fees under the rule of *Lewis v. Kendrick*, 944 F.2d 949, 958 (1st Cir. 1991)?" See Appendix A hereto, at A. 3a. Accordingly, the federal question that Revere has presented in its petition to this court was raised at every step of the proceedings below, and was actually passed upon by the courts below. It is therefore ripe for review in this court. See *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928); *Eddings v. Oklahoma*, 455 U.S. 104, 113-14 n.9 (1982).

Finally, T&D contends that the circuit conflict pointed to by Revere is merely the result of "semantic differences." See Opposition of T&D at p. 11. This Court has recognized, however, that the "shock the conscience" test sets a standard that far exceeds even deliberate misconduct. For example, in *Moran v. Burbine*, 475 U.S. 412, 424 (1986), this court condemned the police practice of deliberately misleading a lawyer for a criminal suspect. The Court

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[1] An application for further appellate review, under Massachusetts practice, is not a brief on the merits. Instead, it is similar to a petition for certiorari before this Court. See Reporter's Notes - 1973 to Rule 27.1, Massachusetts Rules of Appellate Procedure.

concluded, however, that the misconduct did not rise to the level of "misbehavior that so shocks the sensibilities of civilized society. . ." *Id.* at 433-434.

Far from a semantic difference, the "shock the conscience" standard, if permitted to stand, will eviscerate the rule, adopted by most of the circuits, that a grossly excessive or bad faith fee application should be denied in its entirety, as opposed to reduced to a reasonable level. To ensure that this remedy remains available to the lower courts, this court should grant certiorari to review and correct the decision of the Appeals Court.

II. THE REVERE ZONING ORDINANCE IS TO BE GIVEN INTERMEDIATE SCRUTINY

T&D's argument, like the decision of the Appeals Court, presumes that the Revere zoning ordinance must be examined under the strict scrutiny standard. According to T&D and the Appeals Court, because the ordinance, combined with existing environmental regulations and conditions on the ground, has the effect of preventing the operation of *any* adult video store, then the ordinance is a "ban," is not content neutral and is not a time, place and manner restriction on expression. See Brief for T&D p. 15. This position does not conform with the decisions of this Court.

Determining the level of scrutiny to apply depends upon the purpose of the ordinance. If the ordinance is designed to suppress expression, then it is content based and strict scrutiny will apply. See *Erie v. Pap's A.M.*, 529 U.S. 277, 289 (2000), citing *Texas v. Johnson*, 491 U.S. 397, 403 (1989) and *United States v. O'Brien*, 391 U.S. 367, 377 (1968). If, on the other hand, the purpose of the ordinance is unrelated to the

suppression of expression, then intermediate scrutiny is the appropriate standard. *Erie, supra* at 289.[2]

Based upon these well established standards, the Revere ordinance is a content neutral time, place and manner restriction subject to intermediate scrutiny. Like the ordinance in *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), the Revere ordinance, on its face, is directed to the secondary effects of adult entertainment uses. *Id.* at 47. Similarly, the ordinance is not concerned with the content of the entertainment. If it were, it would not permit *any* adult videos from being sold or rented. App. 39a n.8.

In this regard, T&D's characterization of the Revere ordinance as a "complete ban on adult video stores" confuses a means of expression with the expression itself. T&D's analysis is inconsistent with the prior decisions of this Court. See Opposition p. 15. Contrary to T&D's suggestion that there is not a single decision of this Court that would permit the elimination of adult video stores in a community, this Court's decisions in *Erie, supra* at 293-294, *Frisby v. Schultz*, 487 U.S. 474 (1988), *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984), *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), and *United States v. O'Brien*, 391 U.S. 367 (1968) all represent decisions that upheld restrictions that severely limited, or even barred, a means of expression in furtherance of a substantial governmental interest.

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[2] The Appeals Court specifically rejected T&D's claim that the Revere ordinance was passed to prohibit T&D's operation. App. 36a-37a. See T&D's opposition to petition, at pp. 26-27. The conclusion of the Appeals Court, that "unspoken legislative motivations do not appear to us to be relevant in assessing whether an ultimate legislative product is a permissible time, place, and manner restriction," is a correct statement of principles adopted by this Court. See *Erie v. Pap's A.M.*, 529 U.S. 277, 292 (2000).

T&D's remaining contentions are all based upon applying strict scrutiny standards to the Revere ordinance. For example, T&D's arguments that the legislative record was "barren" and therefore Revere cannot justify the substantial governmental interests behind the ordinance were largely addressed in this Court's decisions in *Erie v. Pap's A.M.*, 529 U.S. 277, 297-298 (2000) and *Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 439-441 (2002).[3] Similarly, the claim that the ordinance conditions the right of speech on compelled speech is no different from the position that the ban on complete nudity in *Erie* "compelled" speech from the dancers, or that the restrictions on demonstrations in *Clark*, *Frisby*, or *O'Brien* "compelled" the speakers to change their speech to the government's liking in order to be heard. Finally, the tailoring requirement is far different under intermediate scrutiny than that required in a strict scrutiny context. See *Ward v. Rock Against Racism*, 491 U.S. 781, 798-799 n.6 (1989).

If this Court were to uphold the standards as set forth by T&D, then the only way that a zoning ordinance regulating adult entertainment could pass constitutional muster would be if a municipality made *ample* land area available for an adult video store. Such land would have to be made available regardless of the character of the community, the nature of adjoining uses, or a host of other typical zoning considerations. This Court's cases require no such result and this Court should grant certiorari to ensure

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[3] At trial, T&D failed to mount a real challenge to the substantial interests advanced by Revere to justify the ordinance. The Trial Judge and the Appeals Court passed on the point, going directly to the reasonable alternative avenues of communication prong of the *Renton* arralysis. See App. 35a.

that appropriate standards are applied to the evaluation of a municipal zoning ordinance.

CONCLUSION

For all of the foregoing reasons, as well as the grounds advanced in the petition for a writ of certiorari, this Court should grant the petition.

Respectfully submitted,

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Dated: May 16, 2007

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APPENDIX A

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APPENDIX A

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

SUFFOLK, ss. **APPEALS COURT NO. 2005-P-109**
FAR NO.

T&D VIDEO, INC. D/B/A MOONLITE READER
Plaintiff-Appellee

v.

CITY OF REVERE, et al.,
Defendants-Appellants

ON APPEAL FROM JUDGMENTS
OF THE SUPERIOR COURT

Application of Defendants-Appellants City of Revere, et al., for Further Appellate Review

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COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

SUFFOLK COUNTY Appeals Court No. 2005-P109
F.A.R. NO:

T&D VIDEO, INC. D/B/A MOONLITE READER
Plaintiff-Appellee

v.

CITY OF REVERE, ET AL.,
Defendants-Appellants

APPLICATION OF DEFENDANTS-APPELLANTS
CITY OF REVERE, ET AL.,
FOR FURTHER APPELLATE REVIEW

I. REQUEST FOR FURTHER APPELLATE REVIEW

In accordance with Rule 27.1 of the Massachusetts Rules of Appellate Procedure, Defendants-Appellants City of Revere, et al., ("Revere") hereby request further appellate review by the Supreme Judicial Court of the opinion and judgment of the Appeals Court. Further appellate review is sought since the Appeals Court decision misinterprets the First Amendment and materially interferes with the rights of municipalities to regulate land uses within their boundaries. The Appeals Court decision also fails to follow established precedent in remanding the matter to the lower court to recalculate an award of attorneys fees. Established precedent and sound public policy mandate that a fee award should be denied in this case to the plaintiff T&D Video, Inc. d/b/a **[1]** Moonlite Reader ("T&D").

Permitting the Appeals Court decision to stand (and allowing the Superior Court to recalculate an award of attorneys fees) will give a license to plaintiffs to submit bloated, and grossly excessive, fee requests to the courts, with the expectation that the courts will reduce the request to a smaller, yet profitable, level. Established case law condemns this practice, and this Court should adopt these precedents as the law of the Commonwealth. To ensure the proper application of First Amendment principles and appropriate fee awards, this Court should grant further appellate review to review the decision and judgment of the Appeals Court.

II. STATEMENT OF PRIOR PROCEEDINGS

T&D commenced this action in Suffolk Superior Court on November 16, 1994 by filing a twenty-seven page complaint and a request for injunctive relief against Revere, the Zoning Board of Appeals of the City of Revere, Edward Elfman, Alfred Buccilli, Anthony Giannino, Peter Lattanzi, and John J. Verrengia, as members of the Board of Appeals and Joseph Ferruzzi, as Building Inspector of the City of Revere. Record Appendix ("App") 11-37. At the time of the filing of the complaint, T&D had pending before the Revere Board of Appeals an appeal from the denial of a sign permit for its operation from the Revere Building Inspector. App. 42. T&D proposed to **[2]** ... and is not an appropriate way to interpret a statute. See e.g. *First National Bank of Boston v. Attorney General*, 371 Mass. 773, 789-790 (1977). These considerations render the expert testimony unusable, and the Appeals Court failed to consider these factors in its statement of facts. Aside from these considerations, the Appeals Court's statement of facts is largely accurate.

IV. STATEMENT OF ISSUES FOR FURTHER APPELLATE REVIEW

1. Whether the Appeals Court correctly applied the "independent review" standard in evaluating the trial testimony?

2. Whether the Appeals Court correctly upheld the conclusion of the Trial Judge that there were no areas in the industrial district in Revere where T&D could locate its store in compliance with the ordinance?

3. Whether the Appeals Court's conclusion that there were no reasonable alternative avenues of communication open to T&D was erroneous where it was undisputed that the ordinance permitted numerous conventional video stores in Revere to offer the same adult videos as the ones sold by T&D?

4. Whether T&D's request for an award of attorneys fees was so excessive as to require a denial of all fees under the rule of *Lewis v. Kendrick*, 944 F.2d 949, 958 (1st Cir. 1991)? **[9]** . . .